

ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV 20 2006

at 3 o'clock and 05 min. P.M.
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY L. FROST,

Defendant.

) CR. NO. 02-00117 DAE
) **CV 06 00620 DAE BMK**
) DEFENDANT ROY L.
) FROST'S MOTION UNDER
) 28 U.S.C. § 2255 TO VACATE,
) SET ASIDE, OR CORRECT
) SENTENCE BY A PERSON
) IN FEDERAL CUSTODY;
) EXHIBIT 1
)

DEFENDANT ROY L. FROST'S MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY
A PERSON IN FEDERAL CUSTODY

Name (under which you were
convicted):
Roy L. Frost

Docket or Case No.:

DR. NO. 02-00117 DAE

Place of Confinement:
FDC - Honolulu

Prisoner No.:
88875-022

UNITED STATES OF AMERICA Movant (include name under
which convicted)

V. ROY L. FROST

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: U.S. District Court, District of Hawaii, 300 Ala Moana Blvd., Honolulu, HI 96850
- (b) Criminal docket or case number (if you know): CR No. 02-117
DAE
2. (a) Date of the judgment of conviction (if you know):
June 30, 2006 (copy of judgment attached as Exhibit 1)
- (b) Date of sentencing: 6/23/06
3. Length of sentence: 17 months
4. Nature of crime (all counts): violation of terms and conditions of supervised release
5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐
(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? Admitted guilt to violating standard condition number 2 and general condition and standard condition number 7 of the terms of supervised release

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐
7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☐
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:
- (a) Name of court: 9th Circuit Court of Appeals
- (b) Docket or case number (if you know): 03-10242
- (c) Result: District Court Judgment was affirmed
- (d) Date of result (if you know): August 16, 2004
- (e) Citation to the case (if you know): memorandum opinion
- (f) Grounds raised: 1) Whether appellant's plea was knowing and voluntary; 2) whether the district court erred in sentencing Appellant as an unlawful drug user in contemporaneous possession of an unregistered firearm; 3) whether counsel provided constitutionally effective assistance

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Date of filing (if you know): _____
(4) Nature of the proceeding: _____
(5) Grounds raised: _____

- (6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

- (7) Result: _____

- (8) Date of result (if you know): _____

- (b) If you filed any second motion, petition, or application, give the same information:

- (1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Date of filing (if you know): _____
(4) Nature of the proceeding: _____
(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Denied 6th Amendment right to the assistance of counsel on appeal

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Defendant instructed attorney Harlan Kimura to appeal Judge Ezra's sentence imposing a 17 month jail sentence for violating terms and conditions of supervised release but Attorney Kimura failed to follow this directive and therefore failed to file a notice of appeal

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: The judgment of conviction occurred prior to the judgment filed June 30, 2006 sentencing defendant to 17 months in jail for violating supervised release

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was
filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if
available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is
"No," explain why you did not appeal or raise this
issue: _____

GROUND TWO: _____

(a) Supporting facts (Do not argue or cite law. Just state
the specific facts that support your claim.): _____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction,
did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal,
explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was
filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if
available): _____

(7) If your answer to Question (c)(4) or Question (c)(5)
is "No," explain why you did not appeal or raise this
issue: _____

13. Is there any ground in this motion that you have not
previously presented in some federal court? If so, which
ground or grounds have not been presented, and state
your reasons for not presenting them: This is the first
time the issue of effective assistance of counsel has been
raised, and is being raised now because Attorney Kimura
failed to file the notice of appeal as directed by his
client at the time of sentencing on 6/23/06.

14. Do you have any motion, petition, or appeal now pend-
ing (filed and not decided yet) in any court for the
judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the
docket or case number, the type of proceeding, and the
issues raised. _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
- (a) At preliminary hearing: n/a
- (b) At arraignment and plea: n/a
- (c) At trial: n/a
- (d) At sentencing: n/a
- (e) On appeal: n/a
- (f) In any post-conviction proceeding: Harlan Y. Kimura
- (g) On appeal from any ruling against you in a post-conviction proceeding: n/a
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐ (n/a)
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒
- (a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____
- (b) Give the date the other sentence was imposed: _____
- (c) Give the length of the other sentence: _____
- (d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

The sentencing of the Defendant being challenged in this
motion occurred 6/23/06. Thereafter a judgment was filed
6/30/06 so that the statute of limitation has been met
as required by 28 USC 2255.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.


Therefore, movant asks that the Court grant the following relief: Vacate the judgment and enter a new judgment from which an appeal can be filed.

or any other relief to which movant may be entitled.

Signature of Attorney (if
any) Jack Schweigert, Esq.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on 11-16-06
_____ (month, date, year).

Executed (signed) on
11/16/06 (date).


Signature of Movant
ROY L. FROST

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

* * * * *

(As amended Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 26, 2004, eff. Dec. 1, 2004.)